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National Federation of Community Broadcasters

FEDERAL COMMUNICATIONS COMMISSION
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June 2, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: GC Docket No. 92-52
Comparative Broadcast Criteria

Dear Ms. Searcy:

The National Federation of Community Broadcasters hereby submits the original and four copies of its comments in response to the Notice of Proposed Rulemaking in GC Docket No. 92-52 (RM-7739/7740), released April 10, 1992.

Please refer any questions concerning these comments to the undersigned.

Sincerely yours,

Lynn Chadwick

cc: Office of General Counsel
Downtown Copy Center

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Before the

FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Washington, D.C. 20554

In the Matter of

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings

GC Docket No. 92-52

RM-7739
RM-7740
RM-7741

**COMMENTS OF THE NATIONAL
FEDERATION OF COMMUNITY BROADCASTERS**

Dated: June 2, 1992

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SUMMARY

The system of NCE comparative criteria used for the past quarter century have disserved both NCE applicants and the NCE broadcast system. The Commission correctly concludes that these criteria are meaningless and should be scrapped.

NFCB recommends that the current NCE comparative criteria be replaced with new criteria designed to advance the fundamental goal of the NCE service: diversity of programming. Specifically, NFCB recommends the adoption of a weighted point system which will award comparative credit to applicants that: propose minority-controlled boards of directors, have no broadcast station in the proposed service area, deliver an NCE signal to a significantly greater area or population, are controlled by local residents and originate the majority of their proposed programming. NFCB endorses use of a finder's preference to decide cases that would otherwise be tied.

Finally, NFCB recommends that the FCC use this occasion to clarify its eligibility criteria and the analysis applied to Section 307(b) issues designated in NCE comparative hearings.

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**COMMENTS OF THE NATIONAL
FEDERATION OF COMMUNITY BROADCASTERS**

The National Federation of Community Broadcasters ("NFCB") hereby submits its comments in response to the above captioned Notice of Proposed Rulemaking ("NPRM").¹

I. THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS

The National Federation of Community Broadcasters ("NFCB") is a national, grass-roots, non-profit corporation, founded in 1975 to represent the interests of "community" radio stations. These are noncommercial educational ("NCE") FM stations which draw directly on the artistic and financial resources of their communities of license. The stations are in substantial part supported by contributions from the public and programmed by unpaid volunteers. NFCB's mission is: to promote the ideals and role of community radio in the public broadcasting system; to promote the participation of people of color and women at all levels of public broadcasting; to assist and advocate for the successful operation

¹ FCC 92-98, released April 10, 1992.

all levels of public broadcasting; to assist and advocate for the successful operation and funding of local stations and projects; and to facilitate the production of high quality and innovative programming from diverse sources.

NFCB represents 62 participating member stations and 115 affiliate members. Among the services NFCB offers is assistance to members who file applications for new NCE stations. Because many of these applications have been designated for hearing, NFCB is familiar with the comparative criteria now applied and has a keen interest in revising those criteria to give better guidance to all NCE applicants.

II. BACKGROUND

The Commission's record in establishing effective NCE comparative criteria has not been impressive. In 1967, the Commission concluded that the "boilerplate" 307(b) issue and the comparative criteria applied to commercial applicants were "virtually meaningless" when applied to NCE applicants. New York University, 10 RR2d 215, 217 (1967), 19 FCC 2d 358, 359 (1969). It therefore modified the 307(b) issue and formulated issues which became the standard NCE comparative issues.² These issues are as follows:

1. To determine whether a share time arrangement between the applicants would result in the most effective use of the specified channel and thus better serve the public interest, and, if so, the terms and conditions of the arrangement [The time-share issue];

² The two most notable modifications were the expansion of the NCE integration issue to include "cultural" as well as "educational" objectives in Pacifica Foundation, 21 FCC 2d 216 (Rev. Bd. 1970) and the deletion of the "ascertainment" issue, see discussion infra at page 14-15.

2. To determine:
 - (a) the extent to which each of the proposed operations will be integrated into their respective overall cultural and educational objectives [The integration issue];
 - (b) the manner in which the proposed operations of the respective applicants meet the needs of the community to be served [The now-deleted ascertainment issue];
 - (c) and whether other factors in the record demonstrate that one applicant will provide a superior noncommercial broadcast service;
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted.

Nearly quarter of a century after formulating these issues, the Commission has concluded that they too are virtually meaningless, i.e., so vague as to "make rational choices among noncommercial applicants difficult, if not impossible." NPRM, ¶ 39; See also Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd. 2577, 2580 n. 8 (Rev. Bd. 1991) (application for review pending).

The instant NPRM is the Commission's first attempt to review the NCE comparative criteria since 1967, and the first attempt ever to invite general comments on what the NCE criteria should be. NFCB is grateful for the opportunity to comment on this important issue.

The NPRM seeks comment on whether: (1) the Commission should adopt a modified version of the point system proposed for commercial applicants; (2) whether the commercial criteria are relevant in a NCE proceeding; and (3) whether different or additional criteria should be adopted for NCE proceedings. NPRM, ¶ 40. As set forth in more detail below, NFCB does not believe that the NCE criteria

should be continued in their present form, nor that the criteria proposed for commercial applicants should be applied wholesale to NCE applicants. Rather, it recommends that the FCC devise criteria appropriate to the NCE service.

Before turning to the question of what those criteria should be, it is useful to review Congressional and Commission statements concerning the nature of the NCE service. In 1976, the Commission commented on the evolving role of NCE stations:

It is evident that the role of the noncommercial educational service has grown from purely "instructional programming" to include a broader variety of "public programming." It appears that many public broadcasters can and do program to meet cultural and informational interests often given minimal attention by commercial broadcasters, thus appealing to smaller audiences than commercial broadcasters could serve on a profitable basis.

Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 58 FCC 2d 526, 536 (1976).

Congress took up a similar theme in commenting on the Public Broadcasting Amendment Acts of 1981 (P.L. 97-35):

The existing act clearly emphasizes the intent of Congress that diverse programming with sensitivity to the diverse needs, interests and concerns of our Nation's people, which may be underserved by commercial broadcasting, remain central to the unique service provided by Public Broadcasting.

House Report 97-82 on H.R. 3238, at p. 11.

In deregulating NCE broadcasting in 1984, the Commission generally reaffirmed the view of the NCE service expressed by Congress in 1981:

Thus, the very definition of the service, the status of its operating stations, and its essentially non-profit,

noncommercial programming nature make public broadcasting stations very different, in programming terms, from their commercial counterparts. With this in mind, we expect that as a practical matter the programming of these stations will reflect their special status and that they will provide their communities with significant alternative programming designed to satisfy the interests of the public not served by commercial broadcast stations.

Revision of Program Policies and Reporting Requirements Related to Public Broadcast Licensees, 98 FCC 2d 746, 751 (1984).

The principles which can be extracted from these statements on the nature of NCE broadcasting is that the NCE service has a "special status," distinct from that of commercial broadcasting, and that the service has a duty to provide "alternative programming" which will serve diverse needs and interests that are underserved by commercial broadcasting. Any criteria to be used in choosing among competing NCE applicants must be grounded in these fundamental principles.

NFCB also recommends that in fashioning NCE criteria, the Commission take cognizance of the policies of other federal organizations which foster the development of the public broadcasting system. Although such policies are not legally binding on the Commission, they can illuminate the goals of the NCE broadcasting system and provide instructive guidelines as to how these goals should be achieved. No purpose is served by creating needless conflicts in federal policy.

III. INAPPROPRIATE OR UNWORKABLE CRITERIA

By focusing on the question of what will advance the special goals of the NCE service and by recognizing the failure of comparative criteria used in the past, it is

possible to identify criteria that are either impractical or inappropriate to the NCE service. A brief discussion of such criteria follows.

A. Integration

As the Commission long ago concluded, the integration criterion applied to commercial applicants (i.e., the integration of ownership into the proposed management of the station) cannot meaningfully be applied to NCE applicants. See New York University, supra. This conclusion remains valid today. NCE applicants are typically governed by large boards of directors who have no financial stake in the station, either as owners or employers, but who are committed to its objectives and to the community which will be enriched by its programs. Awarding a preference for "integrating" such board members into the management of the station would not only be impractical, but contrary to the spirit of volunteer service which attracts many community leaders to the boards of NCE licensees. The Commission should not adopt a policy which deters NCE stations from drawing upon the time and talents of their community leaders.

Application of the NCE notion of "integration" is inappropriate for quite different reasons. Consideration of "the extent to which proposed stations operations will be integrated into the applicants' overall operations and objectives" may respect the idealistic objectives of the NCE service, but the issue is so high-minded as to be useless as a means of distinguishing between applicants. The Review Board has repeatedly commented on the "vague", "amorphous", and "meaningless" nature of this criterion and urged its deletion. See Black Television

Workshop of Santa Rosa, Inc., 65 RR2d 34, 35 (Rev. Bd. 1989); Seattle Public Schools, 4 FCC Rcd 625, 639 (Rev. Bd. 1989). In light of the inappropriateness of the commercial integration criterion and the resounding failure of the NCE integration criterion, NFCB recommends that the concept of "integration" in either the commercial or NCE sense be jettisoned as an NCE comparative criterion.

B. Time-Sharing

In adapting the commercial issues to NCE comparative hearings, the Commission considered "the relative integrated use of the requested FM facility." New York University, 10 RR2d at 217. This consideration has evolved into the so-called "time share" issue which has been routinely designated in NCE comparative hearings since New York University. As presently formulated, the issue seeks to determine "whether a share-time arrangement between some or all of the applicants would result in the most efficient use of the channel and thus better serve the public interest." See, e.g., The President and Board of Trustees of the Miami University, MM Docket 92-98, DA 92-517, released May 5, 1992.

The time-share issue has had a career almost as undistinguished as that of the NCE "integration" issue. Often bitterly opposed by the applicants themselves, see, e.g., Southeastern Bible College, Inc., 85 FCC 2d 936 (Rev. Bd. 1981), the issue has nonetheless served as an administratively convenient means of avoiding construction of the NCE criteria. With a wisdom which does not recall that of Solomon, the Commission has tended to split NCE frequencies rather than award them to the better applicant. Only recently has the Review Board begun to express

reluctance to impose time-share agreements on unwilling applicants. See Maricopa County College District, 6 FCC Rcd. 953 (Rev. Bd. 1991).

The time-share issue has served its day. That day dates back to a time when NCE frequencies were far more abundant and when NCE frequencies were often used by schools only during classroom hours. Now, few NCE frequencies are available, and most existing NCE frequencies are used on a full-time basis. NCE applicants willing to take on the formidable task of litigating a comparative hearing deserve better than half a frequency. They deserve clearly defined criteria which will award a construction permit for full-time operations.

While NCE applicants should, of course, be given leeway to fashion time-share agreements as a means of settling a case, they should no longer be forced to enter into time-share agreements involuntarily. Such agreements artificially yoke together organizations with different objectives, different audiences, different staffing and program policies, and different approaches toward funding station operations. The most likely result is a station that is repugnant to its licensees and confusing to its listeners.

Both NCE applicants and the general public will be better served by elimination of the time-share issue and adoption of comparative issues that will award NCE construction permit to a single applicant.

C. Auxiliary Power

Auxiliary power should be eliminated as a comparative criterion, as proposed by the NPRM, ¶ 19. While it may be appropriate to require all broadcast applicants

to propose some form of backup power, such a requirement is relevant to applicants' basic, technical qualifications, not to their comparative qualifications. Because the criterion is irrelevant to the noncommercial nature of the NCE service, it should be eliminated as a comparative criterion. It would be absurd to prefer one NCE applicant over another merely because that applicant included a backup generator in its proposed equipment list.

D. Service Continuity Credit

The Commission has proposed a new criterion which would award credit to applicants committing themselves to own and operate the station for at least three years. NPRM, ¶ 28. The stated purpose of such a criterion is to dissuade speculative trafficking in construction permits.

Whatever the merits of such a criterion in a commercial context, NFCB does not believe the criterion would serve a useful purpose in an NCE context. Applicants apply for NCE stations for reasons other than financial profit. Because of the non-profit nature of the NCE service, there is no true "market" for NCE construction permits, nor is there any evidence that NCE applicants have abused the Commission process by speculating in NCE permits. The tradition of the NCE service is one of stability rather than volatility. Once awarded, NCE licenses tend to be held for long periods of time rather than traded for a quick profit.

Because the "service continuity preference" is designed to remedy an ill which does not plague the NCE service, it should not be adopted as an NCE criterion.

IV. PROPOSED CRITERIA

A. Minority and Gender Preference

As the Commission notes in the NPRM at ¶ 22, "Minority preferences . . . represent one aspect of our attempt, endorsed by Congress, to remedy the effects of past racial and ethnic discrimination and to promote programming diversity." NFCB believes that a minority preference serves to promote the goal of diversity in the NCE as well as the commercial service and that the minority status of the NCE applicant should result in the award of a comparative credit.

The Appropriations Act of October 28, 1991, Pub. L. No. 102-140, is not a barrier to the extension of this well established, and recently upheld policy,³ to the NCE context. As the NPRM correctly notes, the purpose of that Act was to prohibit the Commission from "eliminating or diluting" its minority preferences, not from enhancing them. NPRM, ¶ 23. While the Act prohibits the Commission from repealing, retroactively changing or pursuing re-examination of its minority and gender policies, see, e.g., Re-examination of the Commission's Comparative Licensing, 3 FCC Rcd 766 (1988), it would not restrict the adoption of a minority preference for NCE applicants, since that preference was not then in place or even under consideration.

Adoption of such a preference is not only consistent with the FCC's policy of encouraging diversity in commercial broadcasting programming, and with the Congressional mandate regarding that policy, but with the policies recently adopted by the Corporation for Public Broadcasting ("CPB"), the body charged with the responsibility of distributing federal funds to NCE broadcasting. On May 19, 1992 the

³ See Metro Broadcasting, Inc. v. FCC, 111 L. Ed. 2d 445.

CPB adopted the unanimous recommendation, set forth in the Final Report of the Public Radio Station Grants Review (the "Report"), that CPB modify its formula for distributing funds to public broadcast stations. That modification is based upon the finding that: "Preserving and strengthening the existing public radio system, serving more people of color, improving service to people in exceptionally rural areas, and expanding services to those outside the reach of a public radio signal are critical concerns to public radio." Report, p. 7. In reaching its conclusion that minority and rural stations should receive increased levels of funding, the Report noted that: "public radio has a longstanding interest in increasing and diversifying its audience," and that "CPB-supported stations that serve significant minority audiences merit additional attention. Most, though not all, such stations are licensed to and operated by people of color." Report, p. 26.

Adoption of a minority preference criterion thus would further the Commission's goal of increasing diversity of programming in all broadcast services, and would bring Commission policy into line with other federal policies concerning NCE broadcasting.

B. Diversification

The Commission has historically applied a diversification criterion to competing commercial applicants and declined to apply such a criterion to NCE applicants. See Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 259

(1991).⁴ The NPRM, however, proposes that the diversification criterion be modified and applied to both commercial and NCE proceedings. See NPRM, ¶¶ 21, 40.

NFCB endorses a modified diversification criterion. While NFCB would not penalize existing broadcasters by imposing a diversification demerit on licensees who propose to build a new station, it believes that a diversification credit should be awarded to an applicant which will bring a new voice to its service area.

As noted in Section II above, diversity of programming is a fundamental objective of the NCE service. A criterion which fosters diversity therefore advances the purposes for which the service was established. In the absence of a diversification criterion, there is no basis for favoring a new voice over an established NCE station. Given the general exemption of NCE stations from the multiple ownership and duopoly rules and the limited number of frequencies reserved for NCE use, it is imperative that the Commission adopt a criterion which would, on a comparative basis, favor the new voice over the applicant seeking an additional outlet for the same market.

C. Efficient Use of the Spectrum

When there appear to be significant differences in the size of the areas proposed by mutually exclusive NCE applicants, the Hearing Designation Order for the proceeding typically instructs the Presiding Judge to adduce evidence concerning these

⁴ There, the Commission found "no public interest reason to modify the criteria recognized as comparative factors in an individual contest for a noncommercial educational license". 6 FCC Rcd at 260. The instant NPRM, however, provides the appropriate context in which to reconsider Commission policy.

differences under the catch-all issue of "other factors" which demonstrate that one applicant will provide a "superior educational broadcast service." The evidence adduced under this issue is limited to a comparison of the areas and population served by the competing proposals vis-a-vis existing NCE signals in the same service.

NFCB recommends the continuation of a criterion which awards comparative credit for the delivery of a new NCE service to underserved areas and populations. Such a criterion clearly promotes the mandate of Section 307(b) of the Communications Act, that the Commission ensure a "fair, efficient, and equitable distribution of radio service."

An FCC policy which encourages NCE applicants to serve unserved or underserved areas is also consistent with the policy of other federal organizations. The Public Telecommunications Facilities Program ("PTFP") of the National Telecommunications and Informations Administration Agency ("NTIA") , which funds the construction of NCE broadcast facilities, awards its highest priority to applications which result in:

The establishment of new public telecommunications facilities to extend services to area not currently receiving such services.

15 C.F.R. 2301.2. As discussed supra at p. 11, CPB has recently adopted a policy of providing increased levels of funding to rural stations.

While the FCC should continue its practice of awarding comparative credit on the basis of spectrum efficiency, it should also take this opportunity to clarify the issue and give additional guidance to NCE applicants. Specifically, NFCB recommends that comparative coverage credit be awarded only when a coverage difference is significant.

A significant difference would be one which provides a first, second or third NCE service to an area or population at least 10% greater than the area or population served by a competing applicant. Slighter differences in coverage would be considered *de minimis* and would not be awarded comparative credit.

D. Superior Service to the Community

In recent years, the Mass Media Bureau has, without explanation, ceased to designate an issue to determine "the manner in which [the noncommercial applicants] meet the needs of the community to be served." In concluding that the silent deletion of this issue was "not the consequence of bureaucratic inadvertence, but a purposeful policy choice," the Review Board speculated that deletion of the issue reflected the Commission's deregulation of formal ascertainment procedures Real Life Educational Foundation of Baton Rouge, 6 FCC Rcd. at 2578.

While NFCB feels no nostalgia for forsaken ascertainment formalities and does not recommend that the Commission go back into the business of evaluating the scientific validity of various survey techniques, NFCB does recommend that the Commission award comparative credit to applicants that propose a program service which is likely to provide an "alternative" to available programming. NFCB believes that a reliable measure of whether an applicant will meet this essential goal of the NCE service is the portion of programming which the applicant proposes to originate. NFCB therefore proposes that the FCC award comparative credit to any applicant which proposes to originate at least 50% of its programming.

The award of credit to applicants who will propose to originate the majority of

their programming is consistent with CPB's policy of requiring a new station entering a market to demonstrate that the station will originate "a significant, locally-produced program service designed to serve its community of license" and that it will attract "a 25% unduplicated weekly audience cume." Radio Eligibility Criteria for CPB's Community Service Grant Program. Although NFCB does not recommend that the FCC undertake the complicated task of evaluating projected audience data, it does believe that the level of locally-originated programming proposed is a reliable indicator that the applicant will not substantially duplicate programming which is already available in its service area.

NFCB hastens to add that the credit it proposes for the origination of programming is a comparative credit which reflects the fact that one applicant is more likely than another to provide an "alternative" to the programming already available to the service area. Such a credit would not affect the Commission's longstanding policy that a licensee has broad discretion to choose from either local or non-local programming sources the non-entertainment programming by which it will address the needs of the community. See Georgia State Board of Education, 70 FCC 2d 948, 957 recon. denied, 71 FCC 2d 227 (1979).

E. Local Residence

NFCB recommends adoption of a criterion which would award comparative credit to applicants whose principals reside within the service area of the proposed station. As noted in the NPRM at ¶ 25, the local residence of an applicant's principal ensures "a degree of contact and familiarity with the service area." Such familiarity is more critical for NCE applicants than for commercial applicants, in light of the "special direct contact" NCE stations are presumed to have with their local communities.

Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 FCC 2d at 752.

Adoption of a local residence criterion would provide a basis for favoring an applicant which is rooted in the community over one which merely seeks another "outlet" for a national or regional service. Such a preference is justified. The Commission may reasonably conclude that a governing board the majority of which resides in the service area will be better attuned to the interests and needs of that community. While the Commission permits "satellite" NCE FM stations through waiver of its main studio rules, there is no reason to presume that such a station will carry out the goals of the NCE service as effectively as a station with a true presence in the service area.

F. Finder's Preference

NFCB supports the award of a finder's preference, but only as a "tie breaker." Because the FM reserve band is allocated on a "demand" basis, an applicant must invest an appreciable amount of time in finding an NCE channel which satisfies the

interference criteria set forth in Section 73.509 of the Commission's Rules. NFCB believes that it is reasonable to reward this labor and stimulate thus the development of the NCE spectrum. NFCB also believes that a finder's preference would encourage minorities and other newcomers to apply for NCE frequencies. See NPRM, ¶ 29.

NFCB, however, recommends that the finder's preference adopted be awarded only to break ties between applicants. To award a potentially dispositive finder's preference outside of a tie breaker situation would deprive mutually exclusive applicants of the right to a hearing, see Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), and transform NCE allocations into a "first come first served" process.

G. Point System

NFCB supports adoption of a point system that would quantify and weight the comparative criteria awarded. A more objective and rational system of comparative criteria is long overdue. The system which has, with minor modifications, been in effect since 1967 has neither served the interests of public broadcasting nor provided guidance to NCE applicants. The Commission has reluctantly designated NCE applications for hearing, avoided rigorous construction of the comparative issues, and in most cases ordered time-sharing regardless of the relative merits of the applicants. The uncertainty of the comparative criteria has resulted in NCE comparative hearings that are arbitrary in outcome and needlessly expensive. Faced with an NCE comparative hearing, most qualified applicants simply dismiss their applications. The more committed valiantly fight on, only to be told that the issues governing their case are meaningless.

It is past time for such a system to end. The Commission should use this occasion to fashion criteria which will advance the goals of the NCE service and give applicants a reliable means of assessing the relative merit of their applications. NFCB, therefore, recommends the adoption of the criteria discussed above and the assignment to them of the following points:

<u>Criterion</u>	<u>Points</u>
Diversification	3
Minority Preference	3
Spectrum Efficiency	3
Local Origination	2
Local Residence	2
Finder's Preference	1

NFCB also proposes that, to reduce uncertainty further, the Commission not establish a sliding scale for any given criterion. Points will be awarded, or not. For example, an applicant would be awarded 3 points if the majority of its Board were entitled to claim minority status, but no points for including minorities as token representatives. Similarly, an applicant would receive zero points under the diversification criterion if it was the licensee of a station whose principal service area (i.e., the 60 dBu contour for FM stations) overlapped that of the proposed station, but would receive three points if it was not the licensee of any other stations, or if it was the licensee of stations which did not overlap with its proposed station. Spectrum efficiency would be awarded if an applicant provided significantly better coverage as discussed supra. Local origination points would be awarded if an applicant proposed to originate more than 50% of its programming. Local residence points would be awarded if more than half of the applicant's principals resided in the proposed service

area. In the event of a tie on these criteria, a finder's preference would be awarded to the first acceptable application to be tendered.

V. BASIC QUALIFICATIONS

The NPRM invites comments generally on the issue of whether the Commission should use "different or additional criteria" in NCE proceedings than in commercial proceedings. NPRM, ¶ 40. In response to this invitation, NFCB suggests that the Commission clarify two basic issues which are frequently designated in NCE proceedings.

A. Eligibility

In 1978, the Commission initiated a rulemaking proceeding to establish eligibility criteria for NCE applicants. Eligibility for Noncommercial FM and TV Broadcast Station Licensees, BC Docket 78-164, FCC 78-382, released July 13, 1978.⁵ Although no rule was adopted as a result of this rulemaking, processing staff continue to apply eligibility guidelines outlined in that proceeding. See Way of the Cross, 58 RR2d 455 (1985). These guidelines require cultural "organizations," but not educational institutions, to demonstrate their commitment to "an educational program."

NFCB recommends discontinuance of these eligibility standards. The standards hark back to the days when the NCE service was conceived of as "instructional" in nature, and unfairly disfavor the applicant proposing cultural programming of the

⁵ 43 Fed. Reg. 30842, July 18, 1978.

very type broadcast by most existing NCE licensees. Elimination of these criteria and consideration only of the applicant's nonprofit status would eliminate a bias in favor of institutional applicants and prevent needless litigation. See Seattle Public Schools, 4 FCC Rcd at 639-640.

B. Section 307(b)

In 1967 the Commission announced that the traditional means of evaluating a 307(b) issue, was "inappropriate" in noncommercial comparative cases. See New York University, 10 RR2d at 217; 19 FCC 2d at 359. It therefore modified the 307(b) issue, so that (1) the analysis of available services should be limited to noncommercial signals within the proposed service areas, and (2) the weight accorded the origination point of the signals would be determined by the presiding officer on an *ad hoc* basis. New York University, 10 RR2d at 217. As a result of the *ad hoc* approach established in New York University, it is unclear what 307(b) factors should be applied in the NCE context. NFCB recommends that the Commission overrule New York University and apply the policies and doctrines used to decide a 307(b) issue in the commercial context to NCE applications.

In the Revision of FM Assignment Policies and Procedures (Second Report and Order), 90 FCC 2d 88 (1982), the Commission outlined the priorities to be applied in the evaluation of proposals to amend the FM Table of Assignments under Section 307(b). The priorities indicate that allocation and licensing priority should be given to communities in the following order:

- (1) First full-time aural service;
- (2) Second full-time;